

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

GLENN H. GORTON,)	
)	
Plaintiff,)	
)	
vs.)	Case No. CIV-09-077-F
)	
FLOYD FRY, et al.,)	
)	
Defendants.)	

REPORT AND RECOMMENDATION

Plaintiff, a prisoner appearing pro se, filed a civil rights complaint together with a motion for leave to proceed *in forma pauperis*. United States District Judge Stephen P. Friot has referred the matter to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. §636(b)(1)(B). For the reasons set forth herein, the undersigned recommends that the complaint be dismissed without prejudice due to Plaintiff's failure to timely pay the initial partial filing fee as ordered by the undersigned.

By order of this Court dated January 26, 2009, the undersigned granted Plaintiff's motion to proceed without prepayment of the full filing fee; however, Plaintiff was advised that in accordance with the provisions of 28 U.S.C. §1915(b)(1) he would be required to pay the \$350 filing fee as set forth in that order, including an initial partial payment in the amount of \$2.00 due on or before February 16, 2009. [Doc. No. 6]. Plaintiff was further advised that unless he timely paid the partial fee or showed cause in writing for his failure to pay, the action would be subject to dismissal without prejudice to refiling.

A review of the court records reveals that as of this date, Plaintiff has not made such payment, demonstrated good cause for his failure to pay, nor requested an extension of time within which to pay.¹ Because Plaintiff has failed to comply with this Court's order within the time allowed to do so, this action is subject to dismissal without prejudice to refile. LCvR 3.4(a). *See Cosby v. Meadors*, 351 F.3d 1324, 1327 (10th Cir. 2003) (finding "if a court order requires partial payments, the Federal Rules of Civil Procedure allow a district court to dismiss the action for failure to comply with the order[.]"); *Lucky v. Hargett*, No. 97-6161, 1997 WL 603780 (10th Cir. Oct. 1, 1997)(upholding dismissal without prejudice of § 1983 action based on litigant's failure to pay initial partial filing fee).²

RECOMMENDATION

Accordingly, because Plaintiff has neither paid the partial filing fee as ordered by this Court nor shown good cause for such failure, it is recommended that this action be dismissed without prejudice to refile. Plaintiff is advised of his right to file objections to this Report and Recommendation with the Clerk of this Court by the 17th day of March, 2009, in accordance with 28 U.S.C. §636 and Local Rule 72.1. Plaintiff is further advised that failure to make timely objection to this Report and Recommendation waives his right to appellate review of both factual and legal issues contained herein. *Moore v. United States*, 950 F.2d

¹Three days after the order requiring partial payment, Plaintiff sent a letter to the Court advising that the requirement for payment had "slipped [his] attention" and that "as of 01-29-09 taken care of this and all others." [Doc. No. 7]. No payment or other explanation has been received.

²This unpublished decision is cited as persuasive authority in accordance with Tenth Circuit Rule 32.1.

656 (10th Cir. 1991).

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter.

ENTERED this 25th day of February, 2009.



BANA ROBERTS
UNITED STATES MAGISTRATE JUDGE